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Twenty-fourth session

SUMMARY RECORD OF THE 446th MEETING

Held at the Vienna International Centre, Vienna,
on Thursday, 13 June 1991, at 2 p.m.

Chairman: Mr. SONO (Japan)

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The meeting was called to order at 2.15 p.m.

INTERNATIONAL PAYMENTS: DRAFT MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS (continued) (A/CN.9/341, 344 and Corr.1, 346 and 347 and Add.1)

Article 3 (continued)

1. Mr. GRIFFITH (Observer for Australia) said that article 3 appeared to involve two issues. The first was the extent to which parties had freedom to contract generally, and the second the extent to which particular articles affected their freedom to contract into the regime of the Model Law and also to contract out of it. The Working Group appeared to have accepted that they had freedom to contract out, but that left his delegation with some doubts of the kind identified by the United Kingdom in its written comments and the annex to them (A/CN.9/347, pp. 55-56, 63).

2. His delegation was keen to have an opportunity to discuss fully the basic liability to refund money, dealt with in articles 13 and 16. An important subsidiary consideration was that, where parties to a credit transfer had freedom to contract directly between themselves, the arrangements which they arrived at might affect the derived rights of third parties elsewhere in the chain of transmission of the payment order. An extreme example of what he had in mind would be a situation in which two banks agreed between themselves that no liability should arise for, say, six months after the date on which the money should be transmitted. It was vital for the Model Law to give basic protection to those derived rights. By endorsing the Working Group's proposal for article 3, the Commission would be committing itself to considering what provisions of the Model Law should be subject to the freedom which article 3 afforded, notwithstanding the acceptance of the general principle that parties had freedom to contract out of the Model Law regime.

3. The CHAIRMAN replied that the Working Group had gone into the implications of the words "by agreement of the affected party" and had concluded that only when "agreement" meant "consent" would it become binding on the party concerned. It seemed to him that the point made by the observer for Australia had in fact been addressed in the draft, although the actual wording which catered for it might not be entirely satisfactory.

4. Mr. SCHNEIDER (Germany) observed that the words "freedom of contract" were understood by different delegations in different ways. It was generally agreed that mandatory rules should protect certain special interests which required such protection, as well as third parties not directly involved in a credit transfer contract but nevertheless affected by the payment transaction concerned. Apart from that, parties should be free to organize their contractual relationships as they saw fit. Under those circumstances, the fewer mandatory rules the Model Law contained the better; everything else might be left to a provision of the kind in article 3. There was a difference between that and the approach advocated by the United Kingdom.

(Mr. Schneider, Germany)

5. The kind of contract normally used in mass payment transactions was the standard form of contract. The Commission of the European Economic Community had recently proposed a directive aimed at curbing the use of unfair clauses in standard forms of contract; the directive did that by reference to rules, which although not mandatory, were deemed to be a fair way of safeguarding the interests of the parties. The fact that all the rules in the Model Law would have certain implications for such a process of control pointed to the importance of deciding on what would and would not be mandatory, and of examining the content of the non-mandatory rules.

6. A second equally important point was that if the Model Law contained too many mandatory rules, banks in States which adopted it might simply advise their customers to revert from electronic systems to cheque payments when making funds transfers. One of the principal aims of the Commission was to encourage the use of electronic funds transfer and a wholesale abandonment of it would have deplorable repercussions on the whole payments system.

7. Looking at the Model Law, he did not see any circumstance at all - not even what was contemplated in paragraphs 2 and 3 of article 4 - which justified a mandatory provision. Protection was no more necessary for large transnational companies than it was for small regional banks. What was being discussed was not protection of consumers, but of strong customers perfectly able to look after their own interests. Consumer protection was quite a different matter, on which his delegation would be perfectly willing to agree to the adoption of mandatory rules.

8. Mr. GREGORY (United Kingdom) noted that the Chairman had mentioned the notion of consent. That was important in regard to the way in which the Commission looked at article 3. If the words "with the consent" were added between the word "agreement" and the words "of the affected party", some of his delegation's concerns and, he thought, those to which the observer for Australia had drawn attention would be eliminated. If the Commission wished the provision to be understood as having that meaning, it should make that clear.

9. Mr. ABASCAL ZAMORA (Mexico) asked how a contract between two parties could become binding on a third party which had not given its consent to be bound.

10. Mr. GREGORY (United Kingdom) explained that under English law, such a contract could not affect a third party's rights or obligations directly. However, as the observer for Australia had pointed out, it might affect them indirectly.

11. Mr. BURMAN (United States of America) said that his delegation broadly associated itself with the remarks made by the representative of Germany. With regard to the addition which the United Kingdom had just suggested, his delegation had the same difficulty as that mentioned by the representative of Mexico. The exact wording of the article was very important. It would be most unfortunate if the text was to imply an impediment to an agreement

(Mr. Burman, United States of America)

between two parties to a credit transfer transaction - A and B - because of its possible indirect effects on other parties C, D or E. That would effectively preclude the capacity of persons in the real commercial world to conclude such agreements.

12. The CHAIRMAN observed, in regard to the United Kingdom suggestion, that the intention of the Working Group had been that the wording of article 3 at present before the Commission should express the idea which the United Kingdom wished to bring out. To him, that seemed clear from the fact that the article was worded in the singular: it spoke of "affected party". To take, for example, the situation where an originator and an originator's bank agreed on something which the beneficiary's bank should do in a chain of transfer, the inference was that if the beneficiary's bank gave effect to that agreement it was authorized to do so, but if the beneficiary did not agree to the act in question he would not be bound by it.

13. Mr. LIM (Singapore) endorsed the views expressed by the observer for Australia. He foresaw misunderstandings arising from the use of the word "agreement" in the article as presently worded. He believed that the use of the word "consent" would minimize that possibility.

14. Mr. GRIFFITH (Observer for Australia) said the fact was that the expression "affected party" seemed to refer to one of the two parties directly making the agreement; if it was meant to refer to third parties who might be concerned, as the United Kingdom representative thought was the case, either the wording must be amended or the point must be made very clear in the commentary. Otherwise, there would be a real danger of that meaning being overlooked. His delegation would prefer the wording itself to be amended, on the lines suggested by the representative of the United Kingdom.

15. Mr. SCHNEIDER (Germany) asked whether the words "affected party" were to be taken in their economic or in their legal sense. Contractual relationships normally only created rights and duties between the parties to the contract and there were not more than one or two rules in the Model Law in which the third party had a right against a party with whom no contractual relationship had been entered into.

16. Mr. BERGSTEN (Secretary of the Commission) said that while the titles of the articles - in the present instance "variation by agreement", not "variation by consent" - had no legal standing, they did hold clues as to the intention of the Working Group. That was indicated to a considerable extent by the example given in paragraph 2 of the Secretariat's comments on the article (A/CN.9/346, p. 24). To begin with, "consent" had a different connotation from "agreement". The assumption had been that there would be something in the nature of a contract, an agreement in one form or another. In the Secretariat's example, the agreement to which the beneficiary's bank was not party provided that the order might be processed by account number alone, and the implication was that a discrepancy between the beneficiary's name and the account number led to financial loss. His personal understanding had been that in such a situation the originator, by making that agreement

(Mr. Bergsten, Secretary of the Commission)

with the originator's bank, gave up one of the rights he would have under the Model Law. The agreement was certainly not with the person who received the benefit - in that instance the beneficiary's bank. That led him to conclude that it was the party adversely affected, not the one that received the benefit, that was meant by "affected party".

17. Mr. GREGORY (United Kingdom) asked what the effect on the originator's bank would be if, with the present wording, there had been such an agreement between the beneficiary's bank and the sender's bank.

18. Mr. BERGSTEN (Secretary of the Commission) said that the originator would not then be affected at all.

19. Mr. LE GUEN (France) remarked that the French version used the words "si la partie intéressée y consent" where the English version used the words "by agreement of the affected party".

20. The CHAIRMAN felt that the problems that had been raised were adequately covered by the ordinary law of contracts. It seemed clear that if one was not a party to an agreement one was not bound by it.

21. Mr. SCHNEIDER (Germany) said that the problem was that the word "affected" could cover anyone who was affected economically, even indirectly. Surely what was meant was "agreement between the parties".

22. Mr. POTYKA (Observer for Austria) suggested that the words "of the affected party" might be deleted.

23. Mr. LIM (Singapore) said that, although parties to an agreement normally could not bind third parties, when the Model Law was enacted as a statute in a particular country it would override that general rule of law.

24. The CHAIRMAN asked whether there was any opposition to the suggested deletion of the words "of the affected party".

25. Mr. GRIFFITH (Observer for Australia) thought that the words "of the affected party" were important.

26. Mr. SAFARIAN NEMATABADI (Islamic Republic of Iran) suggested that the wording "by agreement of the parties concerned" should be used.

27. The CHAIRMAN pointed out that the written comments submitted by Japan (A/CN.9/347, p. 35) contained a proposal that the words "agreement of the affected party" should be replaced by the words "agreement of the parties". In the light of the discussions, that solution seemed to deserve consideration.

28. Mr. DUCHEK (Observer for Austria) thought that what was intended was clear: to allow the rules to be changed by the parties concerned. The Commission should not spend too much time trying to achieve perfection of drafting on such a point when there were, in his view, much more serious

(Mr. Duchek, Observer for Austria)

problems that would require its attention if it was to draw up a model law that would be widely acceptable.

29. Mr. GREGORY (United Kingdom) said that, without prejudice to his country's written comments concerning the issues raised by article 3 (A/CN.9/347, pp. 55-56), he would like to suggest, as a contribution towards solving the present drafting problem, that the wording "... the rights and obligations of the parties to a credit transfer may be varied by agreement" might be used, with no reference being made to an "affected party".

30. Mr. BURMAN (United States of America) said that he had difficulties with that suggestion. The problem was that the Commission had not defined who the parties to a credit transfer were. Would the term cover, for example, so-called credit transfer systems?

31. Mr. KOMAROV (Union of Soviet Socialist Republics) agreed with the previous speaker, and felt that the wording just suggested by the United Kingdom representative raised new problems. He preferred the text as it stood.

32. The CHAIRMAN said that, in the light of the discussion, he would like to suggest that the first part of the text should remain as it was and that the final words "by agreement of the affected party" should be replaced by the words "by agreement of the parties concerned". The other problems that had been raised would be covered by the ordinary law of contracts.

33. Mr. GREGORY (United Kingdom) asked whether, if that suggestion were adopted, it would mean that an agreement between the beneficiary's bank and its sender to rely on numbers only would be binding on the originator.

34. The CHAIRMAN said that that question would be decided by reference to the ordinary law of contracts. If the originator agreed to that, he was volunteering to be bound by his agreement. He asked whether he could take it that the Commission agreed that the words "by agreement of the affected party" should be replaced by the words "by agreement of the parties concerned".

35. Mr. BERGSTEN (Secretary of the Commission) said that he would like to mention a linguistic point affecting some of the language versions. In the French and Spanish versions of article 3, the word "agreement" was translated differently in the text of the provision from the way it was translated in the title. In the French and Spanish versions of the text suggested by the Chairman, the word "agreement" should presumably be translated in such a way that it would have the same meaning as in the title.

36. Mr. LE GUEN (France) said that that was a drafting point; there was in fact no difficulty in translating into French the new wording suggested by the Chairman.

37. Mr. LOJENDIO OSBORNE (Spain) said that there was no problem in Spanish either with regard to the translation of the word "agreement" in the amended text suggested. However, the expression "the parties concerned" was not completely clear. Perhaps it would be better to say something like "the rights and obligations derived from the relationships included in a credit transfer may be varied by agreement of the parties".

38. Mr. VASSEUR (Banking Federation of the European Community) said that, in French at least, it would be unsatisfactory to have the word "party" in the singular at the first mention and in the plural at the second.

39. Mr. YIN Tieou (China) said that the wording suggested by the Chairman caused no problems in the Chinese language.

40. Mr. SKELEMANI (Observer for Botswana) asked whether a beneficiary was a party to a credit transfer.

41. The CHAIRMAN said that a beneficiary was not a party in the sense intended. The rights of the beneficiary were covered by the general law.

42. Mr. SOLIMAN (Egypt) said that, in the Arabic version too, the word "agreement" was translated differently in the text of the article from the way it was translated in the title. In the amended text, the term should be brought into line with the title.

43. The CHAIRMAN said that such drafting points would be taken care of by the Drafting Group.

44. Mr. SCHNEIDER (Germany) said that it was difficult to separate drafting from substance unless the concepts were clear. The Commission should have an opportunity to discuss the text again after any drafting adjustments were made.

45. The CHAIRMAN said that that would certainly be possible if a problem arose. However, if he heard no objection, he would assume that there was agreement that the text should be amended to read, in the English version, "Except as otherwise provided in this law, the rights and obligations of a party to a credit transfer may be varied by agreement of the parties concerned".

46. It was so decided.

Additional article on interpretation

47. Mr. ABASCAL ZAMORA (Mexico) recalled that a decision had been taken in the Working Group to include in the Model Law a text on uniform interpretation. The additional article on that subject proposed by his delegation in its written comments (A/CN.9/347, p. 42) was based on the United Nations Convention on Contracts for the International Sale of Goods and other relevant international instruments. Although the Model Law was not a convention, its purpose was not dissimilar, in that it was intended to have universal application. Every effort should be made to obviate discrepant interpretation of the Model Law by the courts of States which adopted it.

48. Mr. SCHNEIDER (Germany) said that it was important to bear in mind the fact that the Model Law affected both private and public international law. In his delegation's opinion, the Mexican proposal was satisfactory from both points of view.

49. Mr. PELICHET (Hague Conference on International Private Law) said that, while a provision of the kind proposed by the delegation of Mexico might logically have its place in a convention, it might not be appropriate in a model law, which must always be compatible with domestic legislation.

50. Mr. AZZIMAN (Morocco) said that his delegation had some hesitation with regard to the Mexican proposal. For example, it was unsatisfactory to define the term "bank" and subsequently to rely on the courts to generate a uniform jurisprudence on the subject.

51. Mr. KOMAROV (Union of Soviet Socialist Republics) said that his delegation also had doubts about the Mexican proposal. It would prefer that reference be made to the international dimension of the relations with which the Model Law was concerned.

52. Ms. KRAG JORGENSEN (Denmark) said that no specific provisions were made in Danish law for the interpretation of international conventions.

53. Mr. SAFARIAN NEMATABADI (Islamic Republic of Iran) said that his delegation would have difficulty in accepting the Mexican proposal.

54. Mr. KOMAROV (Union of Soviet Socialist Republics) said that the text should be left as it was.

55. Mr. ADEDIRAN (Nigeria) said that a provision on the subject should be included in order to prevent divergent interpretations of the Model Law.

56. Mr. ERIKSSON (Observer for Sweden) said that his delegation supported the suggestion made by the representative of the Soviet Union. The question of the applicability of the Model Law was perhaps best left to judges in the courts of the countries concerned.

57. Mr. SOLIMAN (Egypt) said that the general ideas embodied in the proposal by Mexico should be placed in a preamble to the Model Law and not in the text itself.

58. Mr. GRIFFITH (Observer for Australia) pointed out that, when Australia had enacted the UNCITRAL Model Law on International Commercial Arbitration, the interpretation of the instrument had been provided for as follows: "For the purposes of interpreting the Model Law, reference may be made to the documents of: (a) the United Nations Commission on International Trade Law; and (b) its working group for the preparation of the Model Law." His delegation joined those delegations which considered the article proposed by Mexico to be inappropriate for inclusion in the body of the Model Law.

59. Mr. ABASCAL ZAMORA (Mexico) withdrew his delegation's proposal.

60. The CHAIRMAN said that, unless he heard any objection, he would take it that the Commission did not wish to include a text on interpretation in the Model Law.

61. It was so agreed.

Organization of work

62. The CHAIRMAN announced the establishment of the Drafting Group, which would consist of the representatives of China, France, the Islamic Republic of Iran, Mexico, Morocco, Singapore, Spain, the Union of Soviet Socialist Republics, the United Kingdom and the United States of America.

Article 16 bis

63. The CHAIRMAN recalled that at its 444th meeting the Commission had considered, under article 2, the question of adding to the Model Law a definition of the term "interest".

64. Mr. BHALA (United States of America) introduced the following text, which it proposed should be added to the Model Law as article 16 bis: "Unless otherwise agreed, 'interest' means the time value of the transaction amount in the funds or money involved. Interest shall be calculated at the rate and on the basis customarily accepted by the local banking community for the funds or money involved."

65. The text had been prepared by an ad hoc drafting group on the basis of the Guidelines on International Interbank Funds Transfer and Compensation of the International Chamber of Commerce (ICC) and the written comments of Mexico on article 16 (A/CN.9/347, p. 43). It used the term "funds or money" instead of "currency" because the words "funds" and "money" were defined in article 2(i); that definition covered monetary units of account and also referred to the rules of intergovernmental institutions. In response to points raised in the discussion at the 444th meeting, the text avoided mentioning the interbank interest rate as such, but that rate was implicit in the words "the time value of the transaction amount ... customarily accepted by the local community". The proposed text omitted the word "country", which was the point of reference of the ICC Guidelines, because technically there was no country for a monetary unit of account. That would also help to solve the difficulty of selecting a rate when dealing with, for example, eurodollars.

66. Mr. NAGAI (Japan), observing that the interest rate would depend solely on the customs of the local banking community, asked whether, if the local banking community worked on the basis of a currency, the calculation could be based on that currency.

67. Mr. BHALA (United States of America) confirmed that that was the case.

68. Mr. VASSEUR (Banking Federation of the European Community) welcomed the proposed text. Citing the example of a case recently handled by the French courts concerning interest on a dollar transaction between a bank in

(Mr. Vasseur, Banking Federation of the European Community)

Czechoslovakia and a bank in Lebanon, he suggested that the words "local banking community" might usefully be replaced by the words "international banking community".

69. Mr. SOLIMAN (Egypt) felt that the text proposed by the United States representative could advantageously be included among the definitions in article 2.

70. Mr. POTYKA (Observer for Austria) said he was concerned about the use of the words "transaction amount", which were not used in the Model Law itself. Also, although the words "funds" and "money" had been defined in the Model Law, he did not think it appropriate to use them as a replacement for the term "currency". Finally, it should be specified somewhere in the Model Law what the appropriate local banking community was.

The meeting rose at 5.05 p.m.